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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RAY MCKINNEY, Defendant and Appellant.	D054790 (Super. Ct. No. SCN221787)
In re DANIEL RAY MCKINNEY on Habeas Corpus.	D056022

APPEAL from a judgment of the Superior Court of San Diego County, K. Michael Kirkman, Judge, and petition for writ of habeas corpus. Judgment affirmed; petition denied.

INTRODUCTION

A jury convicted Daniel Ray McKinney of second degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury also found true allegations McKinney personally used a firearm (§ 12022.5, subd. (a)), and intentionally and personally discharged a firearm proximately causing great bodily injury and death (§ 12022.53, subd. (d)). In addition, the trial court found true allegations McKinney had one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, 668) and four prior prison convictions (§§ 667.5, subd.(b), 668). The trial court sentenced McKinney to an aggregate term of 59 years to life in prison.[2]

McKinney appeals, arguing the trial court erred by failing to give an accident defense instruction sua sponte, by failing to give two pinpoint instructions relating to implied malice requested by defense counsel, and by giving a modified instruction on imperfect self-defense. In addition, McKinney argues defense counsel provided ineffective assistance by failing to introduce evidence of McKinney's postarrest statements to police to support his accident defense. McKinney raises this same argument in a companion petition for writ of habeas corpus, which we have considered with this appeal.

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1 Further statutory references are to the Penal Code unless otherwise stated.

2 McKinney requests we order the abstract of judgment corrected, arguing it inaccurately reflects the trial court's sentences for the firearm enhancements. The Attorney General disputes this point. We reviewed the document and found no error.

BACKGROUND

Prosecution Evidence

Around 8:30 p.m. a few days after being released from prison, Nathaneal Neumann, the head of the North County Skinheads, spoke with McKinney outside of Travis Tidwell's apartment in Oceanside. Tidwell described the discussion as Neumann "preaching" about the skinheads to McKinney. In addition, Neumann expressed shock that McKinney had pulled a gun on him a few days earlier. Neumann said to McKinney, "I thought you were going to back me up" and "brothers back up brothers." Neumann also made a comment about McKinney's daughter and McKinney appeared surprised that Neumann knew he had a daughter. McKinney told Neumann, "I'm sorry. I'm sorry." McKinney appeared upset or distraught during the discussion, but not afraid. Tidwell did not hear Neumann threaten McKinney during the discussion and the two parted with a handshake.

Tidwell then drove Neumann to a hotel in Oceanside (Oceanside hotel) where Justin Ambrose, Nicelle Nachtneble, and Jessica Dreyer were staying.[3] During the drive, Neumann talked about the possibility of there being a snitch in his midst and advised Tidwell that the snitch would be taken care of or stabbed.

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3 In order to become a member of the North County Skinheads, Tidwell had been "prospecting" for Neumann for approximately seven months. According to Tidwell, "prospecting" meant running errands and doing things for Neumann, such as picking up drugs for him.

After dropping Neumann off, Tidwell returned to his apartment and he, McKinney, and Jennifer Holobovich went to a bar. While Tidwell was at the bar, Dreyer, who was angry with Neumann, called Tidwell and told Tidwell to have McKinney turn on his cell phone. She later told Tidwell she had called McKinney and told McKinney that Neumann was going to have him stabbed.

Dreyer also came to the bar and spoke with McKinney. She appeared "antsy" and McKinney appeared upset and emotional during their conversation. Tidwell heard parts of their conversation, including Dreyer using the word "stab" or "stabbing." McKinney responded by saying, "No, we squashed that" and "Why would he go off and do that?"

Dreyer admitted going to the bar, seeing McKinney there, and chatting with him briefly outside. She denies telling McKinney that Neumann was going to stab him. She also denies McKinney was upset after their encounter. However, she told police that McKinney was worried about Neumann because McKinney did not want to be a skinhead.

McKinney was staying at a hotel in Carlsbad (Carlsbad hotel) with Holobovich and Laurence Hannaford. Earlier in the day, Tidwell and Hannaford had hidden a gun for McKinney in a carpet cleaning machine at the hotel. Approximately 20 to 30 minutes after McKinney spoke with Dreyer at the bar, McKinney asked Tidwell to pick up his bag of clothes and the gun from the hotel. Tidwell retrieved McKinney's gun and bag and returned to the bar. Meanwhile, McKinney tried to find out from Holobovich where Neumann was staying. He was upset and yelling. She told him she did not know.

Tidwell had previously told McKinney that Neumann was staying at the Oceanside hotel. McKinney told Tidwell that he needed to stop by the Oceanside hotel and see Dreyer and Neumann briefly. At McKinney's request, Tidwell called Dreyer to confirm Neumann was still at the hotel. Tidwell also loaned McKinney his truck. McKinney told Tidwell he was going to park the truck up the street from the hotel because he did not want the security guard to see him. At no point did McKinney indicate to Tidwell that he was afraid of Neumann or that Neumann had threatened him.[4]

Around 1:30 or 2:30 a.m., McKinney knocked on the Oceanside hotel room door and Nachtneble opened it. McKinney pushed the door out of her grasp and, with a gun in his hand, asked where Neumann was. Neumann was in the bathroom talking on a cell phone. McKinney saw Neumann and approached him with the gun pointed at his upper torso. McKinney said angrily and aggressively, words like "You said you wanted to do this," "You want to say you're going to stab me," or "You got something to say now."

Neumann, who was approximately 6 feet 2 inches tall and weighed approximately 192 pounds, did not have a weapon and appeared shocked by McKinney's actions. He did not say anything, but he took a few steps toward McKinney, knocked McKinney's gun arm out of the way, and then swung at McKinney's face. Nachtneble turned away to make a phone call and, as she did, she heard a gunshot and then saw McKinney leave the room.

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[4] The prosecution had also charged Tidwell with murder. In exchange for Tidwell's guilty plea to voluntary manslaughter and his truthful testimony in this case, the prosecution agreed to dismiss the murder charge.

The gunshot struck the top of Neumann's chest, slightly below his neck, by his right clavicle. The gunshot damaged two major arteries and Neumann died at the scene a short time later.

Nachtneble, Dreyer, and Ambrose heard two more gunshots fired outside the hotel room and McKinney told Holobovich he discarded the gun somewhere by the hotel. However, police officers did not locate the gun or any casings outside the hotel.

After the shooting, McKinney returned to the Carlsbad hotel, cleaned up, shaved off his moustache, and left. Holobovich asked him what happened. He told her he went over to the Oceanside hotel with a loaded gun, confronted Neumann, and shot him. He told her, "It was either me or him." He also told her that he was trying to protect himself and his friends Dana Pappas and Brett Davis. He never told her he was trying to protect his daughter or other family members. He also never told her the gun had a hair trigger.

Defense Evidence

Before the shooting, McKinney visited Pappas. McKinney appeared scared and nervous. He told Pappas he had an altercation with Neumann and heard Neumann was putting a hit on him and his family. Pappas told McKinney to be careful as he had heard Neumann was not afraid to stab somebody.

Neumann was known to carry a knife. In addition, Dreyer previously told McKinney that Neumann likes to use people for entertainment and that Neumann has stabbed other people in the past. Hannaford also previously told McKinney that Neumann had attacked him with a baseball bat.

When McKinney returned to the Carlsbad hotel after the shooting, he appeared panicked, shocked, and scared. He was crying, sweating, and breathing hard. He told Holobovich that Dreyer had told him Neumann was going to stab and kill him. He said he was sorry and that he shot Neumann because he was threatened, he thought Neumann was going to stab and kill him, and he was protecting himself and a couple of friends.

Toxicology tests showed Neumann had used methamphetamine and marijuana at some point before his death. Nachtneble, Ambrose, and Dreyer had also recently used methamphetamine. Tidwell, Holobovich, and Hannaford had recently used both methamphetamine and marijuana. McKinney had recently used methamphetamine and consumed whiskey and beer. Tidwell admitted his drug use may have affected his memory.

DISCUSSION

A. *Trial Court Not Required to Give Accident Defense Instruction Sua Sponte*

McKinney contends the trial court erred by failing to give the jury an accident defense instruction sua sponte. Under this defense, a homicide is excusable "[w]hen committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." (§ 195, subd. (1); CALCRIM No. 510.) The defense may apply "when a defendant accidentally kills while brandishing a weapon in self-defense, if the defendant acted with usual and ordinary caution." (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 54). Consequently, "[w]hen a murder defendant relies on the theory that the homicide was committed by accident

while the defendant was lawfully acting in self-defense without any unlawful intent, the jury should be instructed on excusable homicide." (*Ibid.*)[5]

Here, McKinney did not rely on an accident defense. Although McKinney's counsel suggested in her closing argument that the gun might have been malfunctioning, she acknowledged that the condition of the gun was unknown[6] and she never argued that McKinney had accidentally discharged it. Instead, she argued McKinney had acted in either perfect or imperfect self-defense by lifting his left hand and discharging the gun after Neumann swung at him and came at him low and from the side.

There is also insufficient evidentiary support for an accident defense. While McKinney told police officers the gun he used had a hair trigger and the shooting was accidental, these statements were not presented to the jury. (See part III.B., *post*.) In addition, none of the eyewitnesses to the shooting testified that McKinney fired the gun accidentally or to facts reasonably permitting such an inference. Neither Dreyer nor

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5 Other than this narrow circumstance, courts generally consider an accident defense to be inconsistent with self-defense because an accident defense involves an unintentional act and self-defense involves an intentional act. (*People v. Villanueva, supra*, 169 Cal.App.4th at pp. 50-51.)

6 A firearms examiner determined from the bullet evidence found at the scene and inside Neumann's body that the gun McKinney used was most likely a .45 caliber semi-automatic pistol manufactured by either Ruger or Llama. He explained that a Llama pistol generally requires 3 to 5 pounds of pressure to fire, and a Ruger pistol generally requires 3 to 5 pounds of pressure if fired in single-action mode or 10 to 12 pounds of pressure if fired in double-action mode. In addition, he explained that the amount of pressure required to fire the guns could be more or less depending on their condition and whether anyone had tampered with them. He also explained that he could not determine how much pressure was required to fire the gun McKinney used without examining the gun.

Ambrose saw McKinney fire the gun. Nachtneble also did not see McKinney fire the gun. Although she testified Neumann knocked McKinney's gun arm away, she did not testify Neumann's actions caused McKinney to fire the gun. Instead, she testified she saw McKinney's gun arm coming back toward Neumann just before the gun fired.

Since McKinney did not rely on an accident defense and there was not substantial evidence to support the defense, the trial court was not required to instruct on the defense sua sponte. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716-717, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 149, 178 fn. 26; *People v. Villanueva*, *supra*, 169 Cal.App.4th at p. 49.) Accordingly, the trial court did not err by failing to do so.

B. *Defense Counsel Did Not Provide Ineffective Assistance by Failing to Introduce McKinney's Postarrest Statements to Police to Support His Accident Defense*

McKinney turned himself into Oceanside police detectives at the San Ysidro port of entry approximately six weeks after the shooting. On the return trip to Oceanside, Detective Douglas Baxter rode in the back seat of the police car with McKinney and wore a hidden digital voice recorder around his neck. McKinney initiated a discussion about the crime and admitted he shot Neumann; however, he claimed the shooting was unintentional. He told Detective Baxter the gun he used had a hair trigger. He asked if the detectives had found the gun and told them he wanted them to find it so they could see the hair trigger for themselves. He then took the detectives to where he disposed of the gun, but they did not find it.

After an evidentiary hearing, the trial court determined the prosecution could introduce McKinney's statements even though he made the statements before being advised of his constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436. Nonetheless, the prosecution opted not to introduce the statements. On appeal and in a companion habeas petition, McKinney contends his defense counsel provided ineffective assistance by failing to introduce the statements herself because they supported his accident defense.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *People v. Salcido* (2008) 44 Cal.4th 93, 170.)

Although the record on appeal does not reveal defense counsel's reasons for not introducing the statements, a declaration from defense counsel submitted with McKinney's habeas petition states she did not introduce the statements because the trial court's ruling on their admissibility applied only to the prosecution and, as to McKinney, they were inadmissible hearsay. McKinney concedes case law supports defense counsel's reason for not introducing the statements. (*People v. Clay* (1984) 153 Cal.App.3d 433, 457 [a criminal defendant's self-serving extrajudicial statements are inadmissible hearsay if offered for their truth]; *People. v. Williamson* (1977) 71 Cal.App.3d 206, 213-214 [same]; see also, *People v. Gurule* (2002) 28 Cal.4th 557, 605-606 [a criminal defendant may not admit testimonial hearsay evidence while avoiding cross-examination].) Nevertheless, McKinney contends defense counsel should have challenged the application of the hearsay exclusion and sought admission of the evidence on federal due process grounds.

Assuming, without deciding, that prevailing professional standards required defense counsel to mount such a challenge, McKinney has not established defense counsel's failure to do so prejudiced the outcome of this case. (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367 [If a defendant fails to show counsel's purported deficiencies were prejudicial, a reviewing court may reject an ineffective assistance of counsel claim on that ground without determining whether counsel's performance was actually deficient].) Exclusion of hearsay evidence under state law does not raise federal due process concerns unless the evidence is critical to the defense and bears persuasive assurances of trustworthiness. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *People v. Butler*

(2009) 46 Cal.4th 847, 866-867.) In this case, McKinney's statements to police were not critical to the defense because, as explained in Part III.A, *ante*, McKinney did not present an accident defense.

Even if the statements were critical to the defense, the statements did not bear persuasive assurances of trustworthiness. The statements were self-serving and McKinney made them approximately six weeks after the shooting under circumstances where he would be motivated to color the facts to his advantage. In addition, the statements are not corroborated by any other evidence. The police never found the gun to determine whether it was malfunctioning or had a hair trigger. Although witnesses heard two more gunshots fired after McKinney left the hotel room, this fact does not, as McKinney suggests, permit an inference the gun was malfunctioning or that it had a hair trigger because the circumstances of those gunshots are unknown. Moreover, the statements are inconsistent with McKinney's spontaneous remarks to Holobovich shortly after the incident. He told her he shot Neumann to protect himself and others. He never mentioned the gun having a hair trigger nor did he describe the shooting as an accident.

A criminal defendant does not have a federal due process right to present unreliable hearsay evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 269.) Therefore, McKinney has not established that defense counsel provided ineffective assistance by failing to challenge the hearsay exclusion and seek admission of the statements on federal due process grounds.

C. *Trial Court Did Not Err in Declining to Give Pinpoint Instructions Relating to Implied Malice*

McKinney contends the trial court erred in declining to give two pinpoint instructions offered by defense counsel to clarify the requirements for implied malice. We conclude there is no merit to this contention.

"A trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] In addition, "a defendant has a right to an instruction that pinpoints the theory of the defense . . . ." ' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation].' " (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

On the requirements for implied malice, CALCRIM No. 520 explains that a defendant acts with implied malice if the defendant: (1) intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time the defendant acted, the defendant knew the act was dangerous to human life; and (4) the defendant deliberately acted with conscious disregard for human life. CALCRIM No. 520 further explains that "[a] *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes."

The first pinpoint instruction requested by defense counsel read: "The death of another person must be foreseeable in order to be the natural and probable consequence

of the defendant's act." This pinpoint instruction essentially restates the definition of "natural and probable consequences" in CALCRIM No. 520 by substituting the word "foreseeable" for the phrase "that a reasonable person would know is likely to happen if nothing unusual intervenes." The substitution adds nothing to the CALCRIM No. 520 definition and arguably obscures it by using less precise language. Accordingly, the trial court properly declined to give the instruction.

The second pinpoint instruction requested by defense counsel read: "Malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." The second pinpoint instruction merely restates the test for implied malice included in CALCRIM No. 520. (*People v. Knoller* (2007) 41 Cal.4th 139, 152.) Although the second pinpoint instruction accurately states the law regarding implied malice, the California Supreme Court has repeatedly cautioned that the language in the pinpoint instruction is potentially confusing to jurors and advised that the better practice is to use the language incorporated in CALCRIM No. 520. (*People v. Knoller,* at p. 152.) Therefore, the trial court properly declined to give this instruction as well.

D. *Trial Court Did Not Err in Sua Sponte Modifying Imperfect Self-Defense Instruction*

The CALCRIM No. 571 imperfect self-defense instruction does not include a definition of "imminent" danger like its predecessor, CALJIC No. 5.17. Finding such a definition was necessary to properly instruct the jury, the trial court sua sponte modified the CALCRIM No. 571 instruction to include the definition of "imminent" danger from

the CALJIC No. 5.17 instruction. McKinney contends the trial court erred in making this modification because the modification places undue emphasis upon the imminent danger component of imperfect self-defense and may have caused the jury to mistakenly think McKinney had to believe Neumann was going to immediately kill or harm McKinney or his family for the defense to apply. We disagree.

As we previously explained, a trial court is obliged to instruct the jury "on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.]' " (*People v. Burney*, *supra*, 47 Cal.4th at p. 246.) Whether McKinney reasonably or unreasonably believed he or his family members were in imminent danger when he confronted Neumann was a pivotal issue in this case. Because one juror's conception of "imminent" might differ significantly from another juror's, we cannot fault the trial court for ensuring the jury had a common understanding of this important term. Moreover, we cannot conclude the modification misled the jury about the legal requirements for imperfect self-defense because the modification correctly states the law. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) Likewise, we cannot conclude the modification placed undue emphasis on the imminent danger component of self-defense because the modification was comprised of a single-sentence paragraph, the paragraph was not conspicuously placed or otherwise highlighted, and the instruction included numerous other single-sentence explanatory paragraphs of similar importance. Accordingly, the trial court did not err in making the modification.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

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MCCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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AARON, J.